

Security of tenure issues related to the Ingonyama Trust Act

Introduction

The KwaZulu-Natal Ingonyama Trust Act No. 3KZ of 1994 (the Act) was enacted just days prior to South Africa's first democratic election and came into force on 24 April 1994. In terms of this Act, the Ingonyama Trust was established to hold all the land that was owned by or belonged to the KwaZulu Government in the name of the Ingonyama as sole Trustee for the benefit, material welfare and social well-being of the members of the tribes and communities living on the land. The Act was significantly amended in 1997 to create the Ingonyama Trust Board (ITB) to administer the land. In 1994 this land did not, as did other Bantustan land, vest in one of the governments or administrations listed in Section 239 of the Interim Constitution as it had vested in the Ingonyama Trust in terms of the Ingonyama Trust Act. This legislation is therefore unique to KZN and the Ingonyama Trust Board has control over land in ways that far surpass anything the Minister of Rural Development and Land Reform has in all other provinces. Seemingly, the difference between KwaZulu-Natal and other provinces is precisely the existence of the Ingonyama Trust Act.

The deficiencies and ambiguities in this Act and its amendments and the ramifications thereof have had a far-reaching effect on the communities and residents on the land concerned. The Panel proposes the review of the Ingonyama Trust Act with a view to repeal or to amendment.

While the Trust has wide-ranging powers to manage the land registered in its name, there are various provisions in the Act that provide protection for the land rights of the beneficiaries, in particular that the Ingonyama shall not infringe upon any existing rights or interests.

Overview of trends since 1994: Insights from commissioned research and round tables

The Trust is meant to exist and function subject to existing land rights under customary law and not act in ways that undermine and abrogate such customary and other underlying land rights. However, the Trust in some instances, regards itself as the outright owner of land and therefore not subject to any duty to consult or to obtain community consent in dealing with the land. This has given rise to instances where the Trust has leased land to external third parties (for example shopping centres) without having first consulted and obtained the consent of those whose informal or customary land rights were subsumed by the shopping centre.

Dispossession of customary rights: Replacing customary rights and PTO certificates with residential leases

Prior to 1994 Permission to Occupy certificates (PTO) were issued as part of a land tenure system that existed in KZN and elsewhere in South Africa on non-surveyed land. PTOs were issued in terms of regulations, and they conferred statutory rights on holders. PTOs were not issued everywhere and in many situations, people occupy and use land on the basis of customary tenure rights without written records. In terms of the Upgrading of Land Tenure Rights Act 111 of 1991 (ULTRA) PTOs could be upgraded to ownership after surveying the land. This is an indication of the strength of such underlying rights. However the Act was

never effectively implemented because of the costs and complexity entailed in surveying land and transferring title. In KwaZulu-Natal PTOs were kept alive after 1994 first by the KwaZulu Land Affairs Act 11 of 1992 and then by Government Notice 32 of 1994.

Annual reports of the Ingonyama Trust indicate that the Ingonyama Trust decided that PTOs should no longer be issued, and has over the years pursued a programme of converting PTOs and existing customary rights in land into lease agreements for both business and residential purposes.

The standard ITB lease agreement provides for a 40-year term, and a 10% annual increase on rental. It compels the 'lessee' to fence the property within six months. The lessee must obtain written permission to build and record all improvements, and submit this to the ITB. The ITB is entitled to cancel the lease agreement for failure to pay rent. All buildings and structures that have been built on the land will belong to the Ingonyama Trust when the lessee vacates the premises.

Significant income is generated for the Ingonyama Trust by such lease agreements. In the 2015/2016 period rental income was R96 130 563. There is little evidence that the revenue generated by leases is used for the benefit of communities or their material well-being. The Trust has built up very substantial reserves.

Ownership of land in townships

The Act originally applied to rural and urban land within the former KwaZulu and included townships known as 'R293' or 'Trust' townships, established in terms of Proclamation R293 of 1962. This meant that the underlying ownership of township land including public places and streets, vested in the Ingonyama Trust. In an attempt to rectify this, the Amendment Act of 1997 provided that the Act shall not apply to townships, and that the land is to vest in the relevant municipality. There is however evidence that the Trust has retained land in townships, and is dealing with this land as if it were the outright owner – continuing to exercise exclusive power to allocate the land, authorise its use, and collect revenue from the land. R293 township sites qualify for upgrading of tenure rights in terms of ULTRA. There has however been widespread failure to implement ULTRA.

Public finance management

The National Assembly's Portfolio Committee on Rural Development and Land Reform has criticised the Trust for its lack of transparency, and concerns have been raised about the revenue received by the Trust and the apparent failure on the part of the Trust to use this revenue for the benefit of beneficiaries.

The Auditor General of South Africa analysed the Trust's compliance with applicable financial legislation, and found that the financial statements were not prepared in accordance with the financial reporting framework prescribed by the Public Finance and Management Act 29 of 1999 (PFMA), that goods and services were procured without inviting competitive bids, and that the accounting authority did not adequately exercise its oversight responsibilities with regard to the implementation and monitoring of internal controls for financial reporting and compliance with legislation.

The ITB is a public entity in terms of the PFMA and its executive authority is accountable to Parliament for the performance of its duties. The Ingonyama Trust is also subject to Section

217 of the Constitution, which requires it to comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness.

Voices of the public

A speaker at the KZN hearing lamented the victimisation of citizens by developmental projects. He argued that when developmental initiatives are introduced, poor citizen's lives are disrupted without their consent. A businessman described how his business was shut down because of outstanding rental fees to the Ingonyama Trust. This was in spite of his having a Permission to Occupy Certificate and having made payments to the traditional leader. A speaker from Jozini submitted that in 2012, Jozini community members were invited to the Jozini Thusong Centre and asked to bring their identity documents. Without explanation, they were told to 'join' the Ingonyama Trust. He now receives monthly rental statements reflecting mounting debt to the Ingonyama Trust. Other speakers complained of the Ingonyama Trust having authorised quarries and other forms of development on their land without their consent. They complained that the benefits from these developments go to the Ingonyama Trust, as opposed to themselves.

Recommendation 3.5

Amendments, repeals, implementation

The Panel motivates for the repeal of the Ingonyama Trust Act to bring KwaZulu-Natal in line with national land policy, and to secure land tenure for the communities and residents concerned. If repeal is not immediately possible, substantial amendments must be made. They must secure the land rights of the people affected, and ensure that the land vests in a person or body with proper democratic accountability. There is also a pressing need to create mechanisms to investigate and resolve complaints by people whose rights have been infringed by the Trust, or whose rights may be infringed in the future.

Ownership of this land vests in the Ingonyama as trustee. If the Act is either amended or repealed, this will not result in automatic transfer of ownership to the people on the land, which is a complex process. The ownership will vest either in the national government or in some other body designated for this purpose. Currently, the ITB and some traditional councils claim the right to the benefits from the land (for example rental or compensation for use of the land by others.) This is not correct: the people who are entitled to those benefits from the land are the people who use the land, and who lose that use. Many (but not all) of them have a claim to customary law ownership of the land. If the Act is either amended or repealed, the repealing or amending Act should state explicitly that the holders of rights to the land (users and occupiers of the land) are deemed to be the owners of the land for the purposes of any revenue from the land or any compensation for use of the land, which would otherwise flow to the registered owner. Any such revenue or compensation shall be paid to them and not to the Ingonyama, the Trust (if it continues to exist) or the state. For example, where a mining company uses land in terms of a mining right granted in terms of the MPRDA, it is obliged to pay compensation for surface rights to the owner. Such compensation should be paid to the people who are deprived of the use of the land, and not to the state or the Ingonyama (the registered owner).

Repeal

The Repeal Act should provide for the repeal of the Ingonyama Trust Act of 1994 and for the disestablishment and dissolution of the Ingonyama Trust. It should include provisions for the transfer of the Trust land, assets, liabilities, rights and obligations to the Minister responsible for land affairs as custodian on behalf of the members of the communities and residents concerned.

Amend

An Amendment Act should provide for the amendment of the Act to ensure that trust land (including all land registered in the name of the Ingonyama as trustee for the Ingonyama Trust) is administered for and on behalf of and for the benefit of the members of the communities and residents concerned. It should also include provisions amending the composition of the Ingonyama Trust Board, which should fall under the auspices of the Minister responsible for land affairs, to provide that trust land shall be subject to national land programmes, to reiterate that the Act shall not apply to land in all townships, to provide for a trust fund, and to preserve the records of the Trust and establish a 'land register'.

Trust Land Register

A Repeal Act or Amendment Act should provide for the preservation of the records of the Ingonyama Trust and the ITB. A 'Register of Trust Land' should be established, which should contain the prescribed information. This should be available for inspection by any person during ordinary office hours and it should also be accessible to the public by electronic means (see Chapter 2 for Land Records Act proposals).

Dispute resolution

A Repeal Act or Amendment Act should provide mechanisms by which an aggrieved person, community or resident whose existing rights or obligations were affected by the administration of the Trust or ITB may lodge a dispute or institute proceedings.

(This document is extracted from the full report of the High Level Panel published on the Parliamentary website: <https://www.parliament.gov.za/high-level-panel>)